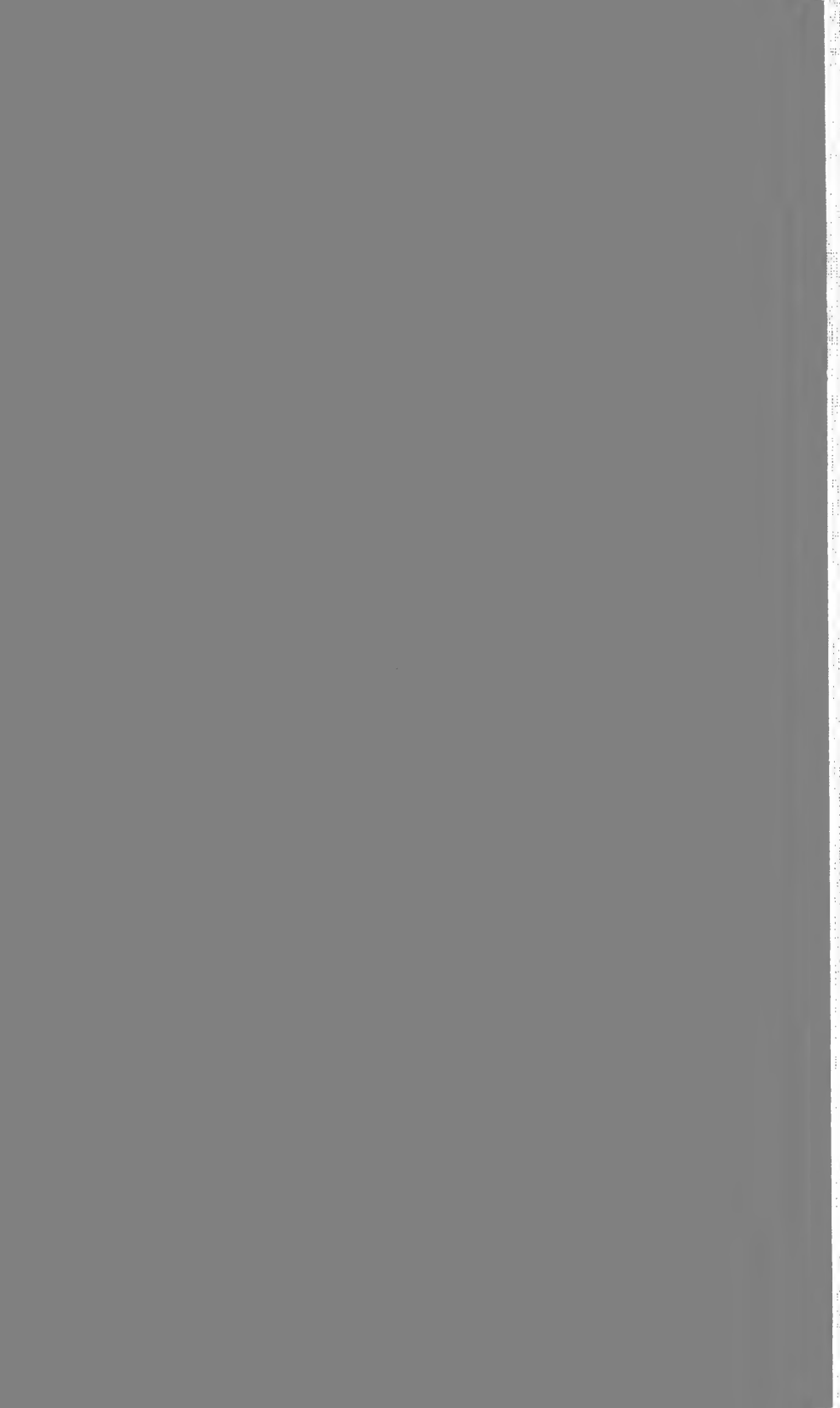


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# REPRESENTATIVE GOVERNMENT AND THE COMMON LAW

A STUDY OF THE INITIATIVE AND REFERENDUM

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## AN ADDRESS

DELIVERED AT THE ONE HUNDRED AND FORTY-THIRD ANNUAL  
BANQUET OF THE CHAMBER OF COMMERCE OF THE  
STATE OF NEW YORK, AT THE WALDORF-  
ASTORIA, NOVEMBER 16, 1911

BY

**HON. EMMET O'NEAL**

GOVERNOR OF ALABAMA



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## REPRESENTATIVE GOVERNMENT AND THE COMMON LAW.

Mr. O'NEAL said:

Mr. PRESIDENT, LADIES, AND GENTLEMEN: Permit me to express my sincere appreciation of the honor conferred upon me and the State I represent by your gracious courtesy in giving me this opportunity to raise my provincial voice under the auspices of this ancient association. Yet the high compliment which your invitation conveys does not prevent me from recognizing my incapacity to do justice to this subject and occasion or exempt me from a sense of humility in being accorded the privilege of standing in the place made memorable by orators, soldiers, and patriots, whose great names have made the roll of your guests a roster of distinguished honor.

From the far-off day when a shilling a plate supplied the meager furnishings of your banquet board to this good hour this association has stood for those principles of business probity and conservative government upon which are based the growth and power of a Republic whose institutions are founded on the rights and fortified by the intelligence of the people. It is therefore consistent with all of its history that in this hour of political unrest and threatened change it should invite a defense of that scheme of government which has in the past stood as a bulwark of defense against the encroachments of arbitrary power and the oppressions of the inconstant numerical majority.

To no enlightened people can any subject be of more vital moment than the making of the laws under which they are to live and under which they expect to enjoy those rights and liberties, not only necessary to human happiness, but essential to a developing civilization.

The empiricism of political doctrinaires and the vicious experiments of political charlatans have ever been the deadly foes of wise, stable, and salutary legislation. Yet there must be a lawmaking body composed either of the people themselves, acting directly in their organic capacity or through chosen representatives. Fully recognizing that fact, the wise men who framed the Constitution of the United States, after mature reflection, thorough investigation, and debate, unanimously discarded the system of direct legislation and established a representative Republic as contradistinguished from a social or pure democracy. The warning lessons of history had taught them that the so-called republics of ancient and modern times, through the absence of the representative principle, had ever been found, as Madison declared, "spectacles of turbulence and contention, incompatible with personal security or the rights of property, and had in general been as short in their lives as they had been violent in their deaths."

It has been fashionable of late years for many who masquerade under the title of progressives to speak in sneering terms of the men who established our system of free government. Yet those men had

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a genius for constitution making unequaled in any other age of the world. They were not only profound students of history, but were free from party bias, passion, or prejudice. They had accomplished successfully a revolution against the greatest military and naval power of the world. They were of English stock, but bred under new conditions; they had inherited as their birthright a love of liberty and a hatred of oppression. It has been truly said that no body of men ever gathered together in history had a sublimer trust in the wisdom and eternal capacity of the people for self-government. Yet they were profoundly impressed with the conviction that there never was a republic as formerly constituted which had not terminated "its fugitive and turbulent existence" with the destruction of the liberties of the people. They agreed with the sentiment voiced by Wilson when he declared that the doctrine of representation in government, which was altogether unknown to the ancients, was essential to every system that can possess the qualities of freedom, wisdom, and energy. They had renounced the divine right of kings, but were unwilling to establish the divine rights of majorities. Direct action by the people they deprecated. They were seeking to erect a government to endure for all time—"a government of laws and not of men."

In embodying in the Constitution the guaranty of a republican form of government, they could have had no other purpose than to interpose a barrier against the encroachments of such revolutionary political vagaries as the initiative and referendum. I therefore unhesitatingly assert that a study of the history of our Government clearly establishes that those who claimed to be inspired by a wise spirit of progress and profess only a purpose to restore popular government by the introduction of the system of initiative and referendum are reactionaries, guilty of the folly of attempting to revive a doctrine unanimously repudiated by the wisdom of the fathers. They seek not merely a change of laws or established policies, which if unwise could be readily repealed, but they undertake to so alter the fundamental law of each State as to weaken or overthrow the representative principle and inaugurate a radical revolution of the basic principles on which the fabric of American government rests.

I admit that it is seriously claimed that the initiative and referendum would not cause an abandonment of representative government, but no candid mind can doubt that a legislative body, with its functions and prerogatives exercised by the people at large, would not long exist except in name. The weakening of its powers and the loss of its dignity and responsibility would be the inevitable precursor of its decline, speedily followed by the complete prostration of the representative principle.

Any constitutional provision which weakens or impairs the power and efficiency of either of the three coordinate departments of government must necessarily weaken and impair the efficiency and harmonious action of the whole. Each acts as check upon the other, and if the power and vigor of any department be impaired or overthrown it necessarily unduly increases the power of the others, thus destroying that harmonious system of checks and balances which is the distinguishing feature of our constitutional system. Wise and



just legislation can not be the product of haste, passion, or immature judgment. To overcome the evil effects of sudden and strong excitement and of precipitate measures, springing from caprice, prejudice, personal influence, and selfish interests, the representative system was established. That deliberation, investigation, and judicial consideration which is essential to the enactment of wise laws is secured by those provisions found in every State constitution, which in mandatory terms requires each bill to be submitted not alone to one deliberative body, but in turn to each of two, and to be considered by each on three successive days.

The division, therefore, of the legislative department into two separate and independent branches constitutes one of the most important features of our system of government. One is generally composed of men who by reason of their short terms and frequent elections are always fresh from the body of the people and are readily responsive to every pressure of public opinion. The period of their delegated authority is too brief for their independent judgment to overcome their susceptibility to the popular will. The members of the other body, selected by a larger constituency, representing more varied interests and further removed by their longer terms from the passions or follies of the hour, may justly be expected to exercise with courage, independence, and judgment a corrective influence upon legislation born of demagogical prejudice, inspired by unwise or visionary political theorists, or based upon some Utopian dream. The tendency of the one is to impulsive action, and of the other to conservatism; and out of this contest of opposing forces and this clash of conflicting thought, illumined by debate and informed by investigation, comes of necessity laws into the construction of which there enters not only the will of the people, but those elements of moderation, justice, and wisdom, and that due regard for the rights of the minority, which are inseparable from wise and just legislation.

Yet we are asked, through the system of the initiative and referendum, to abandon every safeguard with which experience and wisdom have surrounded the making of our laws. We are invited to substitute for those representative bodies—whose members, through the usually required qualifications of a fixed period of residence and the attainment of a certain age, are presumed to have some familiarity with the spirit of our institutions, and to have reached maturity of judgment, and to possess at least average ability and character—the system of direct legislation by the whole body of the people, including the criminal, the adolescent, the indifferent, and the retainers of special interests.

On the false and specious pretext of restoring popular rule and correcting the evils of the representative system we are asked to exchange for the deliberate examination to which legislative bills are subjected, and through which fatal defects and artfully concealed dangers are so frequently discovered, the passions, the prejudices, and the partisan bias which every popular campaign develops, substituting for the information of debate the appeal of the demagogue, and exchanging for the opportunity of amendment the categorical yes and no with which, under the initiative, the voter must meet the subtle and involved proposals of special interests or the wild schemes of visionary reformers. [Applause.]

We do not betray distrust of the people by heeding the unequivocal language of experience, and by refusing to exchange for that deliberation, independence, and conservatism which comes from subjecting every law to the critical and jealous revision of two legislative chambers, and by which unwise and dangerous measures are less apt to proceed to the solemnities of law, the independent, unrestrained, and unrestricted action of the numerical majority.

Through the operation of the initiative a further and more potent check on intemperate legislation is removed by eliminating the power of the executive to amend or veto any measure enacted by direct vote of the people. Through the power to propose, amend, or veto legislation conferred by the express terms of almost every American constitution, the executive is made a part of the lawmaking department and placed on guard to protect the interests of the people against the enactment or evil effects of unjust, unwise, or vicious legislation. Yet, under the system of the initiative, both the executive and legislative departments are shorn of their constitutional powers. Initiated and enacted by direct vote of the people, however unwise a law may be, however much it may destroy the rights of property, invade constitutional guaranties, or impair personal liberty, the executive is powerless to intervene to protect the people against the blow which, from the folly or madness of the hour, they might aim at themselves. The only recourse would be the courts, which, where the system of recall prevails, destroying judicial independence, would be more apt to register popular opinion than to enunciate decisions based upon well-settled principles of law. [Applause.] The messages of the governors of the various States, heretofore characterized by boldness and independence of thought and useful suggestions, resulting in so much wise and beneficent legislation, would largely cease to express their earnest and sincere convictions, but instead would become merely a register of popular passion or prejudice and the suggestions of impractical theorists—the transient and misdirected forces of popular opinion.

It is established by the experience of every section that until abuses become intolerable the demands of personal affairs are too absorbing and the burdens of that public duty which citizenship imposes upon the individual are too heavy or exacting to permit more than a mere perfunctory interest in public matters. In my judgment, therefore, the efficient cause for the larger part of our political ills and of the misgovernment that we may endure, or the treason that may develop in legislative bodies, lies in the indifference of the people themselves and not in their failure to directly participate in the making of the laws.

Whenever the people are aroused and demand a just relief, legislators are quick to hear and ready to obey. It is not through direct legislation but in an aroused public conscience, the growth of a stronger sense of civic duty, a more diligent and watchful interest by the people over their own affairs, that we must rest our ultimate hope of permanent political reform. The forces of reform are too often short-lived, while the evil influences they may overcome generally arise from defeat with renewed vigor.

An antidote to this indifference of the people and a safeguard almost sufficient in itself to overcome the existence of a venal or

corrupt legislature can be found in the high sense of official obligation and the independent exercise by the great majority of American executives of the legislative functions vested in them by the constitutions of the States.

It seems to be assumed that under the system of the initiative only those laws would be proposed which a legislature under the control or domination of special or selfish interests would refuse to pass, and that all such rejected laws would be in the interest of the people. I can not bring myself to the adoption of this pleasing thought. I fear that with the advent of this political millennium there will still remain here and there some unregenerated interests, some seeker for special privilege, whose desires, in imitation of the practices that prevailed in the older days, could still be concealed under the guise of some fair-seeming bill. It would be everybody's business to act as a committee to examine it, to expose its fallacies, or to warn the public against its insidious purposes. The necessary result would be that nobody would give it careful scrutiny or supervision. It would not be subject to such amendment as wisdom or experience might suggest. It must be accepted or rejected in the exact form and terms in which it is proposed. It would not even be read aloud once in the presence of all whose duty it would be to vote upon it, and it might become a law by the vote of a single individual who had never read it until he cast his ballot. It is not improbable that there might be an astute or unscrupulous interest behind it, giving it secret aid and comfort, and although, with a greedy legislature looking on from afar off, there would not be even any Adams County votes for sale, neither would there be anyone, as was the governor in former times, before his power had been overthrown by this modern political reform, charged with the duty of protecting the public against its own indifference or checking the misguided career of public opinion. There would be no magic, from the destruction or overthrow of the legislature, by which the ordinary citizen, to whom political duty is but an incident, could be converted into an alert, vigilant, and well-informed legislator. To qualify a citizen to vote intelligently upon a law involves a degree of investigation and attention to detail and a quality of thought that will be voluntarily assumed only by the elector who appreciates to an extraordinary degree the duty which his citizenship imposes, or an individual who has in the measure a personal interest not consistent with the public good.

With the initiative in operation it would be the sheerest folly to suppose that the number of laws would come within the compass of the ordinary man's serious and considerate examination, and in the consideration of matters which furnish opportunity for demagogical appeals and class or racial prejudice the very purpose for which government exists would often be defeated, and the rights of a helpless minority, no longer protected by the safeguards now secured by every American constitution, would be ruthlessly sacrificed. [Applause.]

I assume that no one will controvert the proposition that laws ought to be made in a spirit as impersonal, with a sense of duty as high, with a conscience as much bound by the solemnity of an oath, with a mind as much informed by argument and debate, and surrounded by an atmosphere as much removed from bias and passion as that in which they are construed and enforced.

To discard well-established methods of procedure by which truth is ascertained and justice administered in our criminal courts and to submit the question of the guilt or innocence of a person charged with crime to the ballot of the electorate would shock the public conscience. Yet to say that men without any more responsibility than is imposed by their own sense of duty, influenced possibly by malice, prejudice, or self-interest, without legal check or constitutional limitation, could by the mere brutal power of a numerical majority take away the most sacred rights or impose the most intolerable burdens upon a helpless minority would be equally as shocking to every man whose sense of justice was not blunted by the poison of false and vicious political theories.

If the claim that opposition to the initiative discloses a distrust of the people be true, then there is no constitutional limitation by which the people restrain themselves which can not be regarded as a reproach. Not a criminal statute has ever been adopted which does not in effect affirm the possible existence of a class of people who may prove unworthy of public trust and who might by their ballots, after the commission of a crime but before conviction, fasten upon their fellowmen an unjust and onerous law.

Opposition to the initiative, then, is not a declaration of distrust of the people, but a recognition of that sound political truth that in the multitudinous interest and varied activities that go to make up the sum of a great people's life, there must be to a qualified extent delegations of public duties and well-considered divisions of public power and public responsibility. To combat this political heresy is not to distrust the people. We would ignore the unmistakable teaching of history if we failed to recognize that every nation which has achieved political and orderly liberty has done so through the representative system and that every Government which has abandoned it for the despotism of a monarchy, or for the turbulence, tyranny, or uncertainty of an unlimited democracy has fallen into decay and suffered the loss of its animating and sustaining principle. [Applause.] England's Parliament has never yielded its prerogative nor have her people ever established a commune. When the first gleam of political and civil liberty that ever lightened the darkness in which the Russian peasant moved made its appearance it was contemporaneous with the establishment of a Duma.

Unless this political heresy is checked the hosts of socialism, reenergized by selfish and time-serving politicians and recruited by all the elements of discontent, will soon direct their attacks against the Federal Government itself and gradually sap and undermine the foundations of our free institutions.

It is claimed by the advocates of the initiative that that system is necessary, because representatives in the legislature can not be elected who are possessed of that capacity and fidelity to duty which fits them to properly perform the high functions of their great office. Such a position, it occurs to me, not only plainly evidences a distrust of the people, but is based on the assumption that the people are incapable of self-government. If it be true that the people are so sunk in abject subservience to political bosses, so tied to the wheels of the political machines, that unworthy legislators can alone be elected, where would be the limitation on the power of those bosses or of that political machine to force through the same electorate the passage of

any laws that their selfish interests might dictate when every safeguard which now surrounds their enactment is removed?

As an American citizen, I am indeed proud to say that it is not true that the men who have represented the sovereignty of the States, who make the laws which protect us in our lives and property, who levy and disburse our taxes and frame our civil and criminal laws, are unworthy and corrupt. There may be isolated instances where members of the legislatures have betrayed the interests of the people, just as there have been isolated instances of wholesale corruption among the people in some localities, but the fault lies not in the system but in the frailties of human nature. The legislators of the various States of the Union have been, as a general rule, the picked and chosen men of the communities from which they have come and have been honest, wise, and patriotic. From whose hands have come, during the century or more of our existence, those laws under which we have grown and prospered and held a higher measure of freedom than has ever come to the lot of any people? The statute books of the American States are filled with wise and beneficent laws, through the operation of which they have grown into great and powerful Commonwealths. It was a great statesman, from whose lips words of idle or extravagant praise never fell, who said:

The statute books of these Commonwealths can be read by the patriotic without a blush. I am not afraid to compare them with the 200 parliaments through which for 800 years the freedom of England has broadened down from precedent to precedent.

Members of the legislatures of the different States are the agents and direct representatives of the people, and if it be true that as a whole they are incompetent, unworthy, and corrupt it would follow necessarily that the masses of the people from whom they spring and from whom they are selected were also either corrupt or criminally indifferent to their interests or liberties. They possess the same characteristics as the people from whom they have come, and if, after repeated trials and selections, the community can not secure an intelligent and honest man to represent it, I would not like to live under laws initiated or adopted by the sovereignty of that people. [Applause.]

It is a sound governmental principle that political power should always be accompanied with responsibility located and identified. Where responsibility can not be placed it does not exist, and an irresponsible power in government inevitably leads to oppression or the loss of liberty. That this responsibility shall not be evaded under our representative system of government, the constitution of every State requires that the legislative record shall disclose the presence or the absence of each legislator, his vote, and his position on every bill. Where in the system of the initiative would this sobering knowledge of responsibility rest? What right would one citizen have to call another to account? Each would represent only himself, and with the utter lack of responsibility on the part of the lawmaking body arbitrary and irresponsible power would be enthroned and the reign of anarchy commence.

We should not overlook the fact that under the initiative, wherever introduced, the State constitutions can be altered or amended with greater ease and facility than even an ordinary statute under the present representative system. No submission of the proposed amendment by a two-thirds vote of the legislature is required. A

small per cent of the voters can at any time propose the most radical or far-reaching constitutional changes and the fundamental law which our people have ever been taught to regard as a shield of defense against the attacks of irresponsible power, which has ever been hedged around with those difficulties of approach so essential to stable government, would become—

As variable as the shade  
By the light quivering aspen made.

We all recognize the truth of Madison's declaration that too much legislation is one of the evils of republican government, and hence every recent constitution has wisely adopted numerous restrictions and limitations on legislative power. Yet we know that, notwithstanding all these limitations, every State has been burdened with too much legislation—an ever-increasing flood of local and private and general law—destroying all uniformity and harmony in the law itself, till in the multiplicity of statutes the citizen is vexed, harassed, and confused. Yet this wise tendency, so clearly manifested in all modern constitutions, to check the ever-increasing volume of laws on every conceivable subject is now to be denounced as a political blunder, and pernicious legislative activity is to be supplemented by laws enacted by the direct vote of the people. If hasty, ill-advised, and ill-considered legislation still remains as one of the vices of our representative system, notwithstanding all the checks and limitations on legislative action found in our State constitutions, is it not the madness of folly to undertake to supplement the present legislative activity by authorizing the making of additional laws by a direct vote of the people and without any of the safeguards secured by deliberation, investigation, amendment, debate, or constitutional restrictions?

We may be impatient with our State legislatures, but the remedy is not to sap or weaken their powers but to elevate their tone and standard, to reorganize them along simpler lines, and to make them the real organs of public opinion, checking the evil effects of hasty and ill-considered legislation, and giving expression to the cool, deliberate, and mature judgment of the people.

Much has been heard in late years of big business. The biggest business conducted in this country is that involved in the government of the various States. Is it not wise to apply sound business principles in administering the affairs of these great public organizations? What would be the fate of any of the great private corporations if their directors, elected by the stockholders, representing and legislating for them and responsible to them, were discharged and the whole mass of stockholders as a body, some wise, some foolish, some mere children, many entirely ignorant of business principles, few moved by the common good, most animated by the desire to secure personal gain, should undertake to direct their policies? In the management of the corporation good government, with the highest returns and best results, is the object sought to be achieved. There can be no difference in kind in the principles applicable to each, and experimental policies dangerous in their tendencies ought to be as carefully avoided in the one as in the other.

That doubtful political policies ought not to be pursued except in the most extreme cases is a sound rule of conduct that I would be happy to bring home to every thoughtful and patriotic American citizen, for there is abroad in the land a dangerous tendency which

would seek to convert every governmental agency into a political experimental station. Unfortunately, there is too evident among our people a love of novelty and "passion for changing customs and destroying old institutions," which would exchange our proved and tried system for one which, however alluring to the political theorist, has always preceded the fall of stable government and the loss of political liberty. Were we without any other remedy and our condition was as deplorable as the propagandists of this new specific for all our political ills declare, for my own part I would still hold fast to the faith of the fathers, rather than attempt "to upset an ancient system hallowed by long use and deep devotion."

If any proposed reform seeks to weaken or overthrow a system whose introduction has been coincident with popular liberty, let us not hesitate to give it the stamp of our stern disapproval. If free institutions are to continue, ours must be a representative government. As declared by your distinguished guest, Hon. James Bryce, government by representation is a principle derived from the oldest customs of the Anglo-Saxon race. Students of English constitutional history can trace the existence of representative assemblies to every period of its national existence, even to remote antiquity. From the earliest forms of tribal government down to the present day there was some form of legislative assembly representing the people, framing their laws, and assisting in their government. With all its defects, a representative system is the best the wisdom and experience of man has yet devised. [Applause.]

But assuming that venal legislators, entrenched in power, deny the statutes they should enact, and refuse to give expression to the calm and deliberate judgment of the people, there is and will always be found in the flexibility of the common law, in its adaptation of old principles to meet changing conditions, a source of power with which the courts are amply armed to curb the aggressions of special interests. The common law I may define to be that code of fundamental principles essential to civil liberty and political freedom, growing out of common custom and natural equity, which were brought by our English ancestors to these shores, and out of which the civil rights and the political liberty of the English people was wrought and in which they are securely rooted, and whose harshness has been ameliorated in the progress of an advancing civilization.

It has been truly said:

One of the great merits of this great system is that it does not consist in a series of detailed practical rules established by positive provisions and adapted to the precise circumstances of particular cases, which would become obsolete and fail when the practice and course of business to which they apply should cease or change, but, instead, of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it.

The common law grew with society, not ahead of it. As society became more complex and new demands were made upon the law by reason of new circumstances, the courts, originally in England, out of the storehouses of reason and good sense declared the common law.

As was said by a great judge:

The common law is a beautiful system containing the wisdom and experience of ages. Like the people it ruled and protected, it was simple and grew in its infancy, and became enlarged, improved, and polished as the nation advanced in civilization, virtue, and intelligence. Adapting itself to the conditions and circumstances of the people and relying upon them for its administration, it necessarily improved as the condition of the people was elevated.

As the principles of natural justice and a sound public policy do not change, the common law, which springs from them, is not subject to decay, nor does it become obsolete with changing circumstances and differing conditions. It is to-day "fresh in the vigor of immortal youth," as potent a living principle as it was when administered by Mansfield or by Hale, and in its ample powers the courts will always find abundant authority to meet every need of government or society.

However reluctant legislators may be to act it will be a strange case indeed in which the common law principles to fit and to protect may not be found.

As a corollary to the initiative, the referendum is proposed to complete the wreck of representative government, and as a fitting device to securely accomplish the atrophy of the legislative functions and to reduce legislatures from coordinate departments of government to a body of mere clerks engaged in performing ministerial duties. When legislatures are compelled to submit their work to the approval of the electorate, there would no longer rest on the electors the duty of selecting men of character and capacity to represent them; nor will the members of such bodies feel the weight of that responsibility which ought to follow public office. That the character of legislation produced by such a body would lack both wisdom, strength, and vigor seems too evident to discuss.

It is no argument in favor of the referendum to say that it is the course followed with reference to constitutions. A constitutional convention is under no necessity to submit the product of its labors to the people for ratification. While it usually does so as a matter of choice, in doing so from its own free will it takes more pride in presenting to the people work well done, and is wholly lacking in that sense of inferiority which under a compulsory submission can but result in indifferent service.

It is my earnest hope that the far-reaching and disastrous effects of these proposed changes will be fully understood by all my countrymen before they give them the sanction of their approval.

I am deeply impressed with the conviction that their adoption would so fundamentally change the entire structure of our political system as to amount to revolution and destroy the whole theory upon which our Government rests and upon which the permanence and vitality of our institutions depend.

Let us all here to-night, inspired by the patriotic memories of this ancient association, consecrate ourselves anew to the service of our States and the Nation, and here firmly resolve that that splendid structure of constitutional government builded by the wisdom and loving care of the fathers, and under whose fostering shelter we have enjoyed the greatest measure of freedom, happiness, and prosperity known to man, shall not be defaced or impaired by the attacks of sincere but misguided men—of time-serving politicians or of political charlatans. [Applause.]

That the Providence whose guiding hand has been so manifest in all the course of our national existence will still lead us safely through these days of doubt and uncertainty I confidently believe. In the genius of the race, I have an abiding conviction that there is and always will be found a redeeming and protecting spirit to walk beside us and through all trials and from all shadows bring us unharmed into that fuller light, to which in the speedy progress of our national evolution we are surely tending. [Applause.]









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